

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000824-001 DT

03/23/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: \_\_\_\_\_

STATE OF ARIZONA

ALISON FERRANTE

v.

JOHN T CLAY (001)

SCOTT C SILVA

GILBERT CITY COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

GILBERT MUNICIPAL COURT

Cit. No. #03TR3292DU

Charge:       1) DUI-LIQUOR/DRUGS/VAPORS/COMBO  
                  2) DUI W/BAC OF .08 OR MORE  
                  3) EXTREME DUI-BAC .15 OR MORE

DOB: 03/23/83

DOC: 11/02/02

The Court has jurisdiction of this appeal by the State of Arizona pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Sections 12-124(A) and 13-4032.

This matter has been under advisement since its assignment on February 10, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record of the proceedings from the Phoenix City Court and the memoranda submitted.

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Appellee, John T. Clay, was charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); Driving with a Blood Alcohol Content Greater than .10 or More, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(2); and Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382(A).

Appellee Clay filed a Motion to Dismiss claiming a violation of his Sixth Amendment Right to Counsel by the failure of the Gilbert Police to allow him sufficient access to a telephone to talk to an attorney, after his request to speak with an attorney. The trial court held an evidentiary hearing in this case and at the conclusion of the evidentiary hearing issued a detailed minute entry order on June 29, 2003. The trial judge (the Honorable Nicole R. Laurin, Gilbert City Court Judge) denied the motion to dismiss, but concluded that the State had failed to meet its burden of proof that further delays to allow Appellee access to a telephone would have delayed the officers' investigation. The trial judge concluded that suppression of the blood test results and "all evidence obtained after the defendant invoked his right to counsel" should be suppressed. The State has filed a timely Notice of Appeal in this case.

The sufficiency of the legal basis to limit an accused access to a telephone - - and an attorney, in a DUI investigation involves mixed questions of law and fact. This Court must review those factual findings for an abuse of discretion.<sup>1</sup> Only when a trial court's factual finding, or inference drawn from the finding, is not justified or is clearly against reason and the evidence, will an abuse of discretion be established.<sup>2</sup> This Court must review *de novo* the ultimate question whether the State (Appellant) met its burden of proof.<sup>3</sup>

The general rule is that an accused has a right to contact an attorney as soon after arrest as feasible, if such contact does not interfere with the officers' investigation of their case.<sup>4</sup> This rule applies to a defendant's right to speak to counsel before taking a Breathalyzer test.<sup>5</sup> The record is clear that Appellee was provided a phone in a private room after requesting to speak to an attorney. The law does not mandate that police officers ensure that defendants call an actual attorney, but only that they be given the opportunity to do so. Both parties refer to State v. Sanders,<sup>6</sup> a recent Arizona Court of Appeals case. In Sanders, the defendant requested a

<sup>1</sup> State v. Rogers, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

<sup>2</sup> State v. Chapple, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); State v. Magner, 191 Ariz. 392, 397, 956 P.2d 519, 524.

<sup>3</sup> State v. Gonzalez-Gutierrez, 187 Ariz. 116, 118, 927 P.2d 776, 778; State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.

<sup>4</sup> McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982); Also see Ariz. R.Crim. P. 6.1.

<sup>5</sup> State v. Juarez, 161 Ariz. 76, 81, 775 P.2d 1140, 1145 (1989) (refusal to allow defendant to call attorney before testing violated Sixth Amendment right to counsel); Kunzler v. Pima County Superior Court, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987) (defendant has right to consult with attorney as long as contact does not interfere with the investigation); State v. Holland, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985) (defendant has right to talk to attorney in private); Martinez v. Superior Court, 181 Ariz. 467, 468, 891 P.2d 934, 935 (App.1994).

<sup>6</sup> 194 Ariz. 156, 978 P.2d 133, 283 Ariz. Adv. Rep. 10 (App. 1998).

